

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LESLIE F. NUESSEN, DECEASED

Claimant

VS.

SUTHERLANDS

Respondent

AND

LUMBERMEN'S UNDERWRITING ALLIANCE

Insurance Carrier

Docket No. 1,057,760

ORDER

Respondent and its insurance carrier appealed the November 5, 2013, Order entered by Administrative Law Judge (ALJ) Brad E. Avery. This appeal was placed on the Board's summary docket for disposition without oral argument.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for claimant. Mark J. Hoffmeister of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 20, 2013, motion hearing, together with the pleadings contained in the administrative file.

ISSUES

This is a claim for a December 21, 2010, accidental death resulting from head trauma that claimant sustained from a fall at work on December 20, 2010. In a December 7, 2012, Award, ALJ Avery determined claimant's death arose out of his employment with respondent. The ALJ awarded death benefits to claimant's two adult legal heirs (\$12,500 to each for a total of \$25,000), funeral expenses not to exceed \$5,000, and medical

expenses. On June 28, 2013, a majority of the Board affirmed the ALJ's Award with two Board Members dissenting.

Claimant, through his heirs, filed a Demand for Compensation and a separate Request for Penalties Pursuant to K.S.A. 44-512(a)¹ (hereinafter referred to as Request for Penalties) because of respondent's failure to pay the award of \$25,000 to claimant's heirs, funeral expenses of \$5,000 and medical expenses totaling \$47,744.68. Claimant also requested costs and attorney fees.

Respondent asserts the Board's Order has been appealed to the Kansas Court of Appeals and, therefore, claimant's demand for penalties is premature. Respondent contends that under K.S.A. 44-556, no weekly benefits are due and owing because no benefits became due and owing in the ten weeks prior to the Board's Order and no benefits became due and owing thereafter. Respondent bases this contention on the theory that claimant's benefits were due on the date of his death.

ALJ Avery ordered respondent to pay claimant penalties, stating:

There is a "Demand for Compensation" in the Court's file dated July 1, 2013 per K.S.A. 44-556 demanding the entire amount awarded be paid. There is a subsequent Request for Penalties Pursuant to K.S.A. 44-512(a) dated August 7, 2013. [Footnote: Both the demand for compensation and request for penalties will be admitted as part of the record of the penalties hearing.] The latter demand for penalties was clearly submitted after the 30 day appeals time had passed by registered mail in compliance with K.S.A. 44-512a(a). Given that both the time for appeal had passed and the Supreme Court's finding that a right to an action under K.S.A. 44-512a accrues after the Board's opinion has become final, the Court finds claimants' demand was not premature.²

The issue before the Board on this appeal is whether claimant is entitled to penalties because respondent failed to pay the \$25,000 lump sum death benefit to claimant's heirs, burial expenses not to exceed \$5,000 and medical expenses in the amount of \$47,744.68.

FINDINGS OF FACT

After reviewing the record and considering the parties' briefs, the Board finds:

In the December 7, 2012, Award, ALJ Avery awarded benefits as spelled out above. On June 28, 2013, a majority of the Board affirmed the ALJ's Award with two Board Members dissenting.

¹ Although the statute cited in the title is K.S.A. 44-512(a), the correct citation is K.S.A. 44-512a.

² ALJ Order (Nov. 5, 2013) at 5.

Claimant sent a Demand for Compensation dated July 1, 2013, to respondent's attorney. A receipt from the U.S. Postal Service shows respondent's attorney received the demand on July 3, 2013. The Demand for Compensation stated in its entirety:

TO: Mark J. Hoffmeister, Attorney for Respondent and Insurance Carrier

Demand is hereby made pursuant to K.S.A. 44-556 that your client pay those funds due and owing to Claimant under the Board's decision. Since all compensation was due at the time of the Board's decision, it is demanded that all funds be paid now pursuant to K.S.A. 44-556(b).

If payment is not timely made, penalties will be requested.³

Respondent's attorney sent a letter dated July 8, 2013, to claimant's attorney disputing the Award was due and owing. In the letter, respondent's attorney indicated that no weekly payments were due and payable to claimant's heirs under the Award and, therefore, the lump sum awarded was not due and payable until the decision on compensability became final.

On July 24, 2013, respondent appealed the Board's June 28, 2013, Order to the Kansas Court of Appeals.

On August 7, 2013, claimant filed a Request for Penalties alleging respondent failed to pay the award of \$25,000 to claimant's heirs, burial expenses of \$5,000, medical expenses of \$47,744.68 and all court costs. Claimant's Request for Penalties argues that K.S.A. 44-556 does not grant a stay for death benefits. Claimant asserted K.S.A. 77-616 allows a stay to be granted by the agency during the judicial review, in this case the Department of Labor, Division of Workers Compensation, but no such stay was granted. Claimant argued K.S.A. 77-616 permits the Kansas Court of Appeals to grant a stay, but respondent made no such request for a stay. The Request for Penalties requested \$100 per week commencing June 28, 2013, each for failure to pay the \$25,000 award and the burial expenses, and \$4,774 for failure to pay the medical expenses. Claimant also requested attorney fees at the rate of \$200 per hour.

A hearing on claimant's request for penalties was held on September 20, 2013. No testimony was taken and no exhibits were introduced. In his November 5, 2013, Order, ALJ Avery ruled:

The entire amount assessed by this Court and affirmed by the Board of \$25,000 is therefore immediately due and payable. Penalties are assessed in the amount of \$100 per week for the 18 week period since the award was issued for the lump sum payment. Penalties on the lump sum continue until the award and

³ Claimant's Demand for Compensation dated July 1, 2013.

penalties are paid in full. A penalty of \$4,747.76 is assessed on Mr. Nuessen's unpaid medical bills, amounting to 10 percent of the unpaid balance. Penalties are to be distributed evenly between the two beneficiaries.⁴

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁶

K.S.A. 2010 Supp. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

K.S.A. 44-512a states in pertinent part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due,

⁴ ALJ Order (Nov. 5, 2013) at 3.

⁵ K.S.A. 2010 Supp. 44-501(a).

⁶ K.S.A. 2010 Supp. 44-508(g).

then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

The Board vacates the ALJ's November 5, 2013, Order and finds claimant is not entitled to penalties. The Board finds claimant's Demand for Compensation was premature as it was sent to and received by respondent's attorney prior to the expiration of respondent's 30-day time limit to appeal to the Kansas Court of Appeals. In *Hallmark*,⁷ the Kansas Supreme Court held compensation awarded was not due until the time for filing an appeal had expired. The Board followed the precedent of *Hallmark* in *Michel*.⁸ In *Michel*, on July 15, 2005, the Kansas Court of Appeals issued its Memorandum Opinion affirming the Board's decision, and on July 20, 2005, Michel's demand letter was sent to respondent. The Board determined claimant's written demand for compensation was premature.

The ALJ's November 5, 2013, Order relies heavily on *Acosta*⁹ and cites five of the Kansas Supreme Court's 13 *syllabi*. The ALJ stated:

K.S.A. 44-556(b) states, "Commencement of an action for review by the court of appeals shall not stay payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review." The Board concluded that because the lump sum did not become due during the period of time when payments were not stayed, the lump sum was not due an[d] owing. [Footnote: The only procedure for staying an award in the Workers Compensation Act is contained in K.S.A. 44-530, a statute which survived in tact *[sic]* after the recent revision of the Act in 2011. Claimant also points out the stay procedure contained [in] K.S.A. 77-616 upon judicial review. There was no evidence provided the respondent had requested a stay under either procedure.]

However, the Supreme Court in *Acosta*, op. cit. Syllabus 9 made the specific finding that the operation of K.S.A. 44-512a was not stayed by an appeal of the Board's order and the right to proceed under the statute arises when the Board issues its order. The Supreme Court considered K.S.A. 44-556 at *Acosta*, op. cit[.]

⁷ *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

⁸ *Michel v. National Beef Packing Company*, No. 270,798, 2005 WL 3665469 (Kan. WCAB Dec. 6, 2005).

⁹ *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

at p. 398. It concluded, “the claimant obtained a total award \$79,608.38 of which \$57,936.72 was due when the award became final and the appellants were obliged to pay while seeking any future appeal or review an[d] modification.” *Acosta*, op. cit., p. 400-401.¹⁰

Acosta is distinguishable from the current claim in that *Acosta* was not a death claim. In *Acosta*, \$57,936.72 of \$78,608.38 awarded to claimant was due and owing from the date of accident, with a balance remaining of \$20,671.66. Thus, under K.S.A. 44-556(b), compensation was due and payable during the ten weeks prior to the Board’s Order and thereafter. In the current claim, no benefits were due claimant’s heirs in the ten-week period prior to the Board’s Order or thereafter.

In *Titterington*,¹¹ the ALJ entered an initial award determining Titterington died as the result of a work-related accident. That award did not discuss the status of the beneficiaries. The award was appealed to the Board, which entered its Order on June 25, 2003. The matter was timely appealed to the Kansas Court of Appeals, and later was transferred to the Kansas Supreme Court. In the meantime, on July 16, 2003, the ALJ entered a subsequent award which clarified the status of the living dependents and ordered that the initial payment of \$40,000 be paid pursuant to K.S.A. 44-510b, followed by 840 weeks of benefits in the amount of \$250 per week, totaling \$210,000. Effective April 16, 2003, respondent began making payments of weekly benefits as required by K.S.A. 44-556(b). April 16, 2003, was ten weeks prior to the Board’s Order of June 25, 2003. The weekly benefit payments continued, pending a final determination by the Kansas Supreme Court. On September 12, 2003, Titterington issued a demand for compensation, requesting all benefits due and owing pursuant to the July 16, 2003, supplemental award of the ALJ. In particular, Titterington sought payment of the lump sum \$40,000 payment, due and owing under K.S.A. 44-510b(a). The ALJ awarded Titterington penalties for 27 weeks from July 19, 2003, at the rate of \$100 per week, totaling \$2,700. The Board reversed, stating:

The Board, therefore, finds that the \$40,000 lump sum payment is an initial payment due and owing immediately after the death occurs. Therefore, rather than becoming due in July of 2003 with the supplemental Award, the \$40,000 lump sum payment became due as of April 18, 2001, the date of Benny Titterington’s death. That payment would, therefore, be controlled by K.S.A. 44-556, and the appropriate stay provisions of that statute would apply.

K.S.A. 44-512a allows for a penalty of up to \$100 per week for each week “any disability compensation is past due.” [Footnote citing K.S.A. 44-512a(a).] As, pursuant to K.S.A. 44-510b and K.S.A. 44-556, the \$40,000 lump sum payment was

¹⁰ ALJ Order (Nov. 5, 2013) at 3.

¹¹ *Titterington v. Brooke Insurance*, No. 270,414, 2004 WL 1058385 (Kan. WCAB Apr. 30, 2004).

stayed, it would not become past due. To award penalties under K.S.A. 44-512a for failure to pay that amount was error on the Administrative Law Judge's part.¹²

K.S.A. 2010 Supp. 44-510b(a) provides that where a worker's death results from a work-related injury, the dependents wholly dependent on the worker's earnings shall receive a \$40,000 lump sum due and payable immediately. In the past, the Board has ruled that a death benefit is due and owing on the date of the decedent's death.¹³ K.S.A. 2010 Supp. 44-510b(d) provides that where a worker whose death results from a work-related injury leaves no dependents, either wholly or partially dependent upon the worker, the legal heirs are entitled to a lump sum payment of \$25,000. The Board acknowledges K.S.A. 2010 Supp. 44-510b(d) does not specifically state the \$25,000 lump sum is due and payable immediately as provided in K.S.A. 2010 Supp. 44-510b(a). Despite the omission of such specific language in K.S.A. 2010 Supp. 44-510b(d), the Board finds the \$25,000 due and owing claimant's legal heirs, his adult children, was due and payable upon his death.

Claimant argues *Bergstrom*¹⁴ and *Casco*¹⁵ require the Board to give effect to the plain and unambiguous language of K.S.A. 2010 Supp. 44-556(b). Claimant asserts the plain and unambiguous language of K.S.A. 2010 Supp. 44-556 does not grant a stay of payment of compensation in death cases. According to claimant, pursuant to K.S.A. 77-616, only the Kansas Department of Labor or Kansas Court of Appeals has the authority to grant a stay. Claimant contends the Kansas Department of Labor did not impose a stay and the Kansas Court of Appeals has not been requested to issue a stay.

The Board agrees K.S.A. 2010 Supp. 44-556(b) is plain and unambiguous and states that commencement of an action for review by the Court of Appeals shall not stay the payment of compensation due for the ten-week period next preceding the Board's decision and for the period of time after the Board's decision and prior to the decision of the Court of Appeals on review. Claimant's lump sum death benefit was due and owing immediately, not during the ten-week period prior to the Board's Order, or thereafter. From the record, the Board finds it is also apparent that claimant's medical expenses and burial expenses were due and payable more than ten weeks prior to the Board's June 28, 2013, Order.

¹² *Id.*

¹³ *Titterington v. Brooke Insurance*, No. 270,414, 2004 WL 1058385 (Kan. WCAB Apr. 30, 2004); see also *Devore v. Inner City Oil Company*, No. 256,742, 2008 WL 5484139 (Kan. WCAB Dec. 31, 2008) and *Khan v. Mobilecomm Professionals, Inc.*, No. 1,030,411, 2009 WL 3191381 (Kan. WCAB Sept. 17, 2009).

¹⁴ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

¹⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

Claimant asserts respondent failed to ask for a stay under K.S.A. 77-616, which states in part:

(a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

(b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

(c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare, the court may not grant relief unless it finds that:

(1) The applicant is likely to prevail when the court finally disposes of the matter;

(2) without relief the applicant will suffer irreparable injury;

(3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

The Board finds K.S.A. 77-616 is not applicable. Claimant filed a request for penalties pursuant to K.S.A. 44-512a that was granted by the ALJ. Respondent appealed. Therefore, there was no reason for respondent to request a stay under K.S.A. 77-616.

Simply stated, the \$25,000 lump sum death benefit, burial expenses and medical expenses incurred by claimant were due and owing more than ten weeks prior to the Board's June 28, 2013, Order and no compensation was due after the Board's Order. Therefore, claimant is not entitled to penalties.

CONCLUSION

Claimant is not entitled to receive penalties because:

1. Claimant's written Demand for Compensation was premature.

2. K.S.A. 2010 Supp. 44-556(b) stays payment of compensation due and owing claimant's adult children while the Board's Order is on appeal to the Kansas appellate courts.

WHEREFORE, the Board reverses and vacates the November 5, 2013, Order issued by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of February, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
krussell@helbert-allemang.com

Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
mhoffmeister@hdwlawfirm.com

Honorable Brad E. Avery, Administrative Law Judge